***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

76-7478

To be argued by
MARK C. RUTZICK

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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P/S

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RANDALL BLACK, et al.,

Plaintiffs-Appellants,

-against-

ABRAHAM BEAME, et al.,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

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# BRIEF FOR STATE DEFENDANTS-APPELLEES

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State
Defendants-Appellees
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3442

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARK C. RUTZICK
Assistant Attorney General
of Counsel

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## Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Hon. Milton Pollack, U.S.D.J.) dated September 1, 1976 dismissing the complaint in its entirety against all

defendants for failure to state a claim upon which relief can be granted and for lack of jurisdiction over the subject matter. The opinion of Judge Pollack, dated August 30, 1976, is unreported.

## Questions Presented

1. Did the District Court properly dismiss appellants' claim that the "least restrictive alternative" doctrine applies to the social welfare field and that the failure of social services officials to provide appellants and their mother with such social services, and benefits as a furnished home, a car and a housekeeper violated their constitutional rights?

2. Did the District Court properly dismiss appellants' other constitutional claim as well as their statutory claims for lack of jurisdiction over the subject matter?

## Statement of the Case

Defendants-appellees Bernard Shapiro, Chairman of the New York State Board of Social Welfare and Stephen Berger, former Commissioner of the New York State Department of Social Services (now succeeded in interest by Commissioner Philip L. Toia) (hereafter "State" defendants-appellees) respectfully

join with the Municipal defendants-appellees Abraham Beame, et al., in incorporating by reference the counter-statement of the facts of defendants-appellees Christian and Reichardt ("Housing Authority" defendants-appellees) to the extent relevant.

The State defendants-appellees cannot help but observe that the appellants' Statement of the Case fails to comply with several basic rules of appellate practice. It would be hoped that a Statement of the Case would be limited if not to facts then at least to allegations appearing somewhere in the record of the case. Plaintiffs here however exercised no such self-restraint. Their Statement of the Case repeatedly and inexcusably includes sweeping assertions of fact, policy and motivation nowhere ever raised in the District Court, nor appearing, even implicitly, in the record of this case. The melodrama and exaggeration which characterize their Statement of the Case often seem more appropriate for a day-time television audience than an appellate court.

Examples of exaggerated and previously unpleaded statements abound. On page 5 of appellants' brief, Ms. Black is characterized in 1971 as "increasingly despondent" and "desperate and depressed". These psychological evaluations, of whatever relevance (Ms. Black is not a party to this

action), are new to the case. Rather then admit that Ms. Black voluntarily placed four of her children into foster care, the brief now asserts that "she reluctantly asked the New York City Bureau of Child Welfare to assume responsibility" for the four children and that the Bureau "responded by sending these children to a child care institution". To read those statements one would think the Bureau had snatched the four children out of Ms. Black's arms. We learn, too, for the first time, that this decision was "the last resort", and that "[h]ad she know [sic] of any other alternative Ms. Black would never have agreed to split up her family. . . ." Piously, the brief asserts that "no one indicated to her that programs in fact existed to help families overcome periods of difficulty and adjustment." (This assertion is reminiscent of the classic "when-did-you-stop-beating-your-wife" argument). Then, incredibly, the Brief begins to sound like the testimony of an expert witness and claims that "[t]his bureaucratic bias in favor of foster care placement is unfortunately typical", and finds this alleged bias "nonetheless inexplicable". One will search the record in this case in vain for even so much as an allegation in the court below to the effect of this sweeping policy condemnation. Yet the appellants do not let such niceties stand in their way.

Appellants also assert, without support in the record, that "defendants have reacted to every plea for assistance as though it were a burdensome inconvenience undertaken only for purposes of harrassment." (pp. 7-8). On appeal appellants characterize the motives of the defendants, though they failed to raise the issue below. Finally, as a sort of coup de grace, the Court is told that "[d]efendants' entire emphasis was and is on hastening the dissolution rather than promoting the reconstruction of the Black family." (pp. 8-9). With "facts" like these, appellants hardly require an argument.*

Further, appellants display for the first time in their brief an affidavit of a social work professor which by their own admission was never served on or provided to the defendants below and which is not a part of the record in the District Court (See Docket Entries at A. 1-2). Appellants then rely heavily on this affidavit apparently to support the validity of a social policy predicated on appellants' legal theories. Appellants' claim that this affidavit was

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* After concluding this litany of alleged malevolence, appellants end by stating "Judge Pollack ruled that this policy and practice is consistent with defendants' constitutional and statutory duty " (p. 9). Thus the District Judge himself receives membership in the club wrongdoers. Yet this bald assertion so distorts Judge Pollack's careful -- and overly generous -- opinion as to render unnecessary any defense of the District Judge beyond a simple reference to the opinion itself.

shown to Judge Pollack in camera, if true, is certainly a puzzling form of civil practice, but in any event does not establish that Judge Pollack gave any weight whatever to it in his decision. Without such an indication, the affidavit ought not to be considered by this Court, which must be bound by the record before it on appeal. See Federal Rules of Appellate Procedure, Rule 10.

Finally, the utter impropriety of the so-called Statement of the Case in appellants' brief is vividly illustrated by appellants' complete and total failure to comply with Rule 28(a)(3) and (e) of the F.R.A.P., which requires factual statements to be supported by references either to the appendix or the record itself. Appellants do not indicate the basis in the record for even one of the many assertions which they would label as "fact". Yet the Court, together with the appellees, is asked to accept these facts or hunt through the record to disprove them. A look at some of the appellants' so-called "facts" may show the reason for this seeming lapse.

It also must be reiterated that even where an allegation is taken from the complaint (of which there are some examples) it is only that -- an allegation. Where a factual allegation speaks in sweeping, conclusory, judgmental terms, without any specific factual support, it should not automatically receive the deference given a more precise, narrowly-focused averment. Yet a reading of appellants' statement of the case would suggest that the sweeping derogatory "facts" contained therein had been proven in some way or agreed to by the defendants. This is far from correct.

## POINT I

### THE DISTRICT COURT CORRECTLY HELD THAT DANDRIDGE V. WILLIAMS FORECLOSED APPELLANTS' CLAIM OF CONSTITUTIONAL INFRINGEMENT ARISING FROM DEFENDANTS' FAILURE TO PROVIDE APPELLANTS' MOTHER WITH A HOUSE, A CAR, A HOUSEKEEPER AND ADDITIONAL SUPPORTIVE SERVICES

Appellants have gone to great lengths in their brief to obscure the precise nature of the relief they (but not their mother) seek in this action, limiting their argument to a discussion of lofty constitutional ideals such as "least restrictive alternative" and "family integrity".

Yet the reality of the relief they desire is to compel the defendants to provide Ms. Black with (1) a furnished home large enough for her, her ten children and her two grandchildren (and presumably more grandchildren when they arrive) (2) a car, (3) a three-day-per-week social worker (4) a full-time housekeeper (homemaker) and (5) additional supportive services (see affidavit of social worker Sarah Zwiebel, ¶ 6, annexed to appellants' brief).* Appellants claim that they are entitled to these services as a matter of constitutional right. This is the claim which Judge Pollack found sufficiently lacking in merit to deny the court jurisdiction over the subject matter of this case. It will be shown that this decision was unquestionably correct.

The basis of appellants' constitutional argument seems to be that the doctrine of "least restrictive alternative", enunciated by the Supreme Court in reference to the First Amendment arena in Shelton v. Tucker, 364 U.S. 479 (1960), must control the operation of New York's social welfare system. New York, appellants contend, must provide to Ms. Black whatever services are necessary to enable her to avoid placing some of her children voluntarily into foster care, as she has in fact done with four of them, in order to preserve the "integrity" and "privacy" of the

* At the very minimum, appellants assert a constitutional right to a six-bedroom apartment in public housing. This is apparently all Ms. Black herself has ever asked for.

Black family. Appellants contend that since New York has chosen to provide a system of child welfare services to its poor, it must offer all services necessary to render voluntary foster care placements unnecessary, since such placements are said to produce the disintegration of families.* Appellants would compel New York to offer all (and presumably only) services "least restrictive" in their effect upon the ability of the recipient families to avoid voluntary separation.

This application of the "least restrictive alternative" doctrine to the social welfare area would turn that concept on its head. The "least restrictive alternative" theory was devised by the Supreme Court to limit the actions the States may take to restrict the First Amendment and other fundamental liberties of individuals in furtherance of legitimate state interests. See Shelton v. Tucker, supra at 488; Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Roe v. Wade, 410 U.S. 113 (1973). It has never been applied, or thought to apply, to require the state to undertake a social program or any affirmative act in order to further the individual's First Amendment or fundamental interest where the

* This premise, of course, conflicts with the accepted view that the purpose of foster care is to strengthen families. See Ramos v. Montgomery, 313 F. Supp. 1179 (S.D. Cal. 1970), affd. mem. 400 U.S. 1003 (1971).

State was not trying to limit that interest in any way.* The very words "least restrictive" require as a logical predicate that there be some restriction upon an interest. If the State is not trying to limit a First Amendment or fundamental interest, then there can be no comparison of degrees of restrictiveness, and the doctrine of "least restrictive alternative" has no relevance.

Neither New York nor any other state operates its social welfare system for the purpose of restricting the First Amendment or fundamental rights of its citizens. Even appellants admit this much (Brief at 13). New York does not seek to deny social services recipients their rights of free speech or association, or family privacy, as a price of receiving benefits, and appellants have not alleged such a practice.** Since New York is undertaking no restrictions, the "least restrictive alternative" doctrine is inapposite.

* Thus for instance in the cases involving civil commitment of the mentally ill, the state's action in institutionalizing the sick individual would deprive him of his very liberty. See Covington v. Harris, 419 F. 617 (D.C. Cir. 1969); A. 84. And in Roe v. Wade, supra, the state sought to limit the individual's liberty to control pregnancy and reproduction.

** Judge Pollack in any event considered and rejected this argument in his decision (A. 86-87) and appellants have not contested that holding on this appeal.

The impropriety of applying the "least restrictive alternative" doctrine to this case is mirrored in the morass that would result from efforts to comply with such an application. It is one thing for a Court to invalidate a statute on the ground that it sweeps too broadly. It is quite something else for any Court to assume the burden of weighing each and every social service program offered in New York to determine which mix of services, with what degree of financial support, is constitutionally sufficient to constitute a "least restrictive alternative" as applied to the Black family as well as the several hundred thousand other families receiving social services in New York. In this case appellants have produced an affidavit from a social worker detailing her view of the services "needed by the family" (Zwiebel Affidavit ¶ 6) -- including a furnished home, a car, a housekeeper, a social worker and more. Appellants admit that even with these services "there is no guarantee" that the Black family could remain together (Brief at 22). Yet even Ms. Zwiebel's plan is largely based on programs not offered in New York, and of a magnitude not likely soon to be financed out of New York's limited

social services budget.* It is difficult to imagine a more inappropriate function for a court to perform on judicial review than that of determining the adequacy of social services programs, as measured against an unarticulated but apparently limitless standard of services, to achieve the intangible social goals of family preservation and strengthening.** Yet appellants' success in grafting the "least restrictive alternative" doctrine onto the social services field would produce just such a result.

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* Appellants seek to create the impression that money is not a factor in the decisions of social services agencies concerning what programs to offer. They support this contention with a footnote citation to their own counsel's oral argument before the District Court, specifically to an assertion that $250,000 has been expended since 1971 to care for the four Black children in foster homes. This is another "fact" not appearing in the record, nor pleaded in the complaint, and cannot be understood or credited (let alone verified) without an explanation. Appellants' counsel was not a witness in this case, and her factual assertions at oral argument carry no more weight than her adversaries' statements in opposition. For a more realistic appraisal of the dire straits of New York's social services budget, see Schneider v. Whaley, 541 F. 2d 916 (2d Cir. 1976). The time has not yet come by any means that New York can provide its poor with a home, a car and a housekeeper.

** It must be remembered that, after all, Ms. Black voluntarily placed her four children into foster care. Thus the adequacy of social services programs under the "least restrictive alternative" doctrine would require evaluation against the subjective standard of what Ms. Black's voluntary decision would be in any variety of circumstances -- a determination impossible for either a court or a social services agency.

The Supreme Court came face to face with appellants' theory in Dandridge v. Williams, 397 U.S. 471 (1970), and rejected it categorically. Dandridge was a challenge on Equal Protection grounds to a Maryland statute placing a maximum on the AFDC grant available to a single family irrespective of the number of members of the family. Id. at 473-74. The recipients claimed that the statute discriminated against younger members of large families and led to the destruction of families by encouraging the "farming out" of younger children to relatives not yet receiving the maximum grant. Id. at 476-77. A District Court had overturned the statute as "invalid on its face for overreaching" Id. at 484.

The Supreme Court recognized that the purpose of the Aid to Families with Dependent Children program was to preserve families, Id. at 479, but nevertheless reversed the District Court and upheld the challenged statute. The Court observed:

> "If this were a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of 'overreaching' would be significant and might be crucial. For when otherwise valid governmental regulation sweeps so broadly as to impinge upon

> activity protected by the First Amendment, its very overbreadth may make it unconstitutional. See, e.g. Shelton v. Tucker, 364 U.S. 479. But the concept of 'overreaching' has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights. . . . For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident or out of harmony with a particular school of thought'. Id. at 484.
>
> "[T]he Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all. . . . It is enough that the State's action be rationally based and free from invidious discrmination." Id. at 486-87.

Thus the Supreme Court in Dandridge rejected the contention that the interest in preserving and strengthening families -- recognized as the goal of the AFDC program -- was sufficient to justify judicial scrutiny for "overreaching" and the concomitant application of the "least restrictive alternative" doctrine. Appellants here raise exactly the same contention, except instead of an Equal Protection

predicate they invoke some sort of penumbral privacy interest to avoid the impact of Dandridge. They seek precisely the same result as the recipients in Dandridge -- to impose on the States in the social welfare field the same strictures as apply to state regulation of First Amendment and fundamental liberties.

The Court in Dandridge emphasized that such strictures could not and should not be imposed on the states by the Courts:

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised.... [T]he intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court.... [T]he Constitution does not empower this Court to second-guess state officials charged with the responsibility of allocating limited public welfare funds among the myriad of potential recipients." Id. at 487.

Judge Pollack properly heeded this warning in dismissing appellants' claims below. He also noted a distinction between this case and Dandridge which further weakens appellants' position here -- the absence of any entitlement

on the part of appellants or their mother to the services or benefits they seek. In Dandridge, at least, the recipients had a claim of entitlement to AFDC benefits under the federal Social Security Act, 42 U.S.C. §§ 601 et seq., particularly 42 U.S.C. § 602(a)(10). Dandridge, supra at 473, 476. Here appellants point to no statute or enactment which entitles them to any of the services they now seek as a matter of constitutional right. A. 89. Cf. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); see Goldberg v. Kelly, 397 U.S. 254 (1970). The funds which appellants seem to look to for the financing of their desired programs are those for foster care which are provided to the States through Title XX of the Social Security Act, 42 U.S.C. §§ 1397 et seq., on a block grant basis.

In Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976) Judge Weinfeld had occasion to consider a claim very similar to the appellants' claim here. The Child plaintiffs asserted that the constitutional right to privacy created a concomitant constitutional "right" to adoption for children removed from the homes of their natural parents. The Court found that the plaintiffs there sought not a right to non-interference in family life, but rather a right to receive the benefit of a discretionary social service program --

adoption -- in order to create a permanent stable home. Id. at 602-03. The Court rejected this claim, holding that even though the State offered its adoption program to further its objective of giving children a permanent home, "the State's objective is not thereby transmuted into a fundamental right of adoption into a permanent and stable family enforceable under the Federal Constitution." Id. at 603.

Even though "adequate, decent, safe and sanitary housing is a component of a full and adequate family life," Ibid., it is not a constitutionally recognized fundamental right. Lindsey v. Normet, 405 U.S. 56 (1972). For similar reasons neither a furnished home nor a six-bedroom apartment (let alone a car and housekeeper) is a fundamental right of a welfare recipient, and the failure of the State to provide those amenties can not give rise to the strict scrutiny of the "least restrictive alternative" doctrine.

## POINT II

### THE DISTRICT COURT PROPERLY REJECTED APPELLANTS' OTHER CONSTITUTIONAL AND STATUTORY CLAIMS

While Judge Pollack discerned five constitutional arguments in appellants' complaint, appellants on this appeal have pursued only one in addition to the "least restrictive alternative" argument discussed in Point I. They have contested Judge Pollack's dismissal of their claim (which is certainly not apparent from the complaint) of undue delay in the provision of the supportive services and benefits they claim they are entitled to. See A. 88-89. Yet it seems clear that this claim is completely contingent on the success of appellants' initial claim of a right to those services and benefits. If the social services defendants have no obligation to provide Ms. Black with the specific services and benefits she desires at all, then obviously there is no issue of undue delay. Judge Pollack correctly perceived that in the absence of an entitlement to a benefit, a lapse of time before providing it can not create a constitutional violation. He did consider -- contrary to the statement in Appellants' Brief at 34 -- if any statute

created an entitlement. He concluded: "[B]y failing to set out either in their answering papers or their complaint any statute or other state pronouncement entitling them" to the benefits and services they sought, "the plaintiffs have also failed to make a case for any application of this due process concept to this case." A. 89.

Judge Pollack correctly declined to consider appellants' statutory claims (which are set forth in barest form only in ¶ 58[6], [7] of the complaint, A. 20). Having carefully weighed each of appellants' constitutional claims (only two of which were evidently serious enough to be pursued on this appeal) Judge Pollack found them "obviously without merit." A. 94. He thus found that those claims did not meet the tests for jurisdictional substantiality set forth in Goosby v. Osser, 409 U.S. 512 (1973) and Hagans v. Lavine, 415 U.S. 528 (1974), and accordingly he had no jurisdictional predicate upon which to entertain appellants' statutory claims under the pendant jurisdiction doctrine. Even if the constitutional claims did pass the Goosby-Hagans test of substantiality, Judge Pollack enjoyed the discretion to decline to exercise pendant jurisdiction over the ambiguous and conclusory statutory claims. "It has consistently been recognized that pendant jurisdiction is

a doctrine of discre on, not of plaintiff's right." Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (footnote omitted); Hagans v. Lavine, supra at 558 (Rehnquist, J., dissenting); Almenares v. Wyman, 453 F. 2d 1075, 1084 (2d Cir. 1971) cert. den. 405 U.S. 944 (1972); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F. 2d 800, 809 (2d Cir. 1971). Judge Pollack could properly decline to exercise pendant jurisdiction in this case, and his decision is entirely supportable, especially where the complaint itself gives so little hint of what the statutory claims might be.*

Nor was there any basis for jurisdiction under 28 U.S.C. § 1331, requiring the existence of $10,000 in controversy between the parties. The simple ritual recitation of monetary loss is not sufficient to confer jurisdiction. KVOS, Inc. v. Associated Press, 299 U.S. 269, 278-79 (1936). The monetary value to the appellants of the social services they seek is speculative, uncertain and indeed doubtful as to these minors. "The federal courts cannot take cognizance under Section 1331 of cases in which

* It is significant that Dandridge v. Williams, supra, involved what must be essentially the same statutory claims as the appellants would like to raise here, and that this claim was plainly rejected by the Supreme Court in Dandridge. This consideration could properly enter into Judge Pollack's exercise of his discretion.

the rights are not capable of valuation in monetary terms. And the jurisdictional test is applicable to that amount that flows directly and with a fair amount of probability from the litigation, not from collateral or speculative sources." Kheel v. Port of New York Authority, 457 F. 2d 46, 49 (2d Cir. 1972); Rosado v. Wyman, 414 F. 2d 170, 176 (2d Cir. 1969) rev'd on other grounds, 397 U.S. 442 (1970). The amount in controversy must involve an "economic loss". Economic Op. Com'n of Nassau County Inc. v. Weinberger, 524 F. 2d 393, 408 (2d Cir. 1975) (Friendly, J., concurring). In view of the lack of any direct economic loss to the appellants, neither of the aggregation theories articulated in Snyder v. Harris, 394 U.S. 332 (1969) or Bass v. Rockefeller, 331 F. Supp. 945 (S.D.N.Y.), appeal dismissed as moot, 464 F. 2d 1300 (2d Cir. 1971), can be applied to attain the $10,000 requisite amount.

## CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
January 3, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State
Defendants-Appellees

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARK C. RUTZICK
Assistant Attorney General
of Counsel

STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK )

MAGDALINE SWEENEY, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for State Defendants-Appellees herein. On the 3rd day of January, 1977, she served the annexed upon the following named person:

MARCIA ROBINSON LOWRY
STEVEN R. SHAPIRO, of counsel
New York Civil Liberties Union
Children's Right Project
84 Fifth Avenue
New York, New York 10011

EDWARD W. NORTON
General Counsel
Jeanne Hollingsworth, of counsel
New York City Housing Authority
250 Broadway
New York, New York 10007

W. BERNARD RICHLAND
Corporation Counsel
Carolyn E. Demerest, of counsel
Municipal Building
New York, New York 10007

Attorneys in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address es within the State designated by them for that purpose.

Magdaline Sweeney

Sworn to before me this
3rd day of January, 1977

Assistant Attorney General
of the State of New York